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Supreme Court U.S.
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CAPITAL CASE

No. 04-637

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

BETTY MITCHELL, Warden,
Petitioner/Appellant

v.

JOHN DAVID STUMPF
Respondent/Appellee

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent/Appellee, John David Stumpf, seeks leave to proceed *in forma pauperis*.

Respondent was granted leave to so proceed in both the U.S. District Court and the U.S. Court of Appeals, and counsel was appointed for Respondent under the Criminal Justice Act of 1964, 18 U.S.C. § 3006. Consequently, pursuant to Rule 39.1, no affidavit is attached.

Respectfully Submitted,

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One of Respondent's Attorneys

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RESPONDENT'S BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit correctly determined that the facts in the record – including Respondent's diminished mental capacity, potentially ineffective counsel, as well as numerous indications during the plea proceedings that Respondent never understood the true nature of the charges against him – outweigh the relative import of counsel's representation that Respondent understood the charges, and render Respondent's guilty plea involuntary.

2. Whether the Sixth Circuit correctly determined that the state's prosecution of successive defendants was based on wholly inconsistent, irreconcilable theories and therefore violated Respondent's due process rights.

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INTRODUCTION

The Sixth Circuit's decision rests upon an exhaustive review and application of the facts specific to Respondent's case. According to the Sixth Circuit, those facts lead to two conclusions: Respondent's guilty plea was involuntary according to the standards developed by this Court, and the State's use of conflicting theories in order to convict Respondent and his accomplice for firing the same shot violated due process. The Sixth Circuit reached these conclusions only after it excavated all the relevant facts and applied the appropriate standards to those unique facts. Petitioner's claim that the Sixth Circuit's decision creates "a wholesale change in the legal landscape surrounding guilty pleas," (Brief for the Petitioner at 3), is as "exaggerated" as it was when raised in *Henderson v. Morgan*, 426 U.S. 637, 647 (1976) ("We think Petitioner's fears are exaggerated."). The Sixth Circuit simply recognized Respondent's case for what it is: a unique set of facts and circumstances that establish grounds for relief under the relevant standards. Such a decision requires no further review.

First, the Sixth Circuit determined that Respondent's guilty plea had been involuntary because the unique facts and circumstances surrounding the plea indicated that Respondent never understood the true nature of the charges against him. Among the numerous discrete factual indications cited by the Sixth Circuit were facts directly analogous to the facts this Court relied upon in *Henderson v. Morgan* as well as facts commonly deemed significant to this inquiry among the sister circuits. Specifically, Respondent suffers from diminished mental capacity, as did the Respondent in *Henderson v. Morgan*. 426 U.S. at 647; *see also Gaddy v. Linahan*, 780 F.2d 935, 944 (11th Cir. 1986). In addition, the Sixth Circuit felt compelled to point out that defense counsel's performance likely had been constitutionally ineffective, despite the fact that this issue was not even before the court. *See, e.g., Allen v. Mullin*, 368 F.3d 1220, 1242 (10th

Cir. 2004); *Gregory v. Solem*, 774 F.2d 309, 316 (8th Cir. 1985). Most importantly, however, the Sixth Circuit's thorough exegesis of the plea proceedings indicates that Respondent simply never understood the true nature of the charges against him. When these facts are reviewed under the standards this Court has established for reviewing a guilty plea only one conclusion is appropriate, the conclusion the Sixth Circuit reached.

Second, the Sixth Circuit concluded that the prosecution violated Respondent's due process rights when it secured two convictions based on wholly inconsistent theories. In Respondent's case, the state secured a guilty plea and ultimately a death sentence by arguing that Respondent was the sole shooter of Mary Jane Stout. Then, in seeking a conviction of Respondent's accomplice, Wesley, the same prosecutor argued before a jury that Wesley was the sole shooter of Mary Jane Stout. The Sixth Circuit, consistent with this Court's precedent and the decisions of a number of circuit courts, concluded that the prosecution's blatant manipulation of the evidence was inconsistent with this Court's overriding concern with justice of finding guilt. This decision was fair and just and does not present a legal issue worthy of this Court's attention.

REASONS TO DENY THE PETITION

I. The Sixth Circuit's decision holding respondent's guilty plea involuntary is entirely consistent with *Henderson v. Morgan* as well as the developing trends among the circuits, and represents the type of fact-intensive decision this court routinely considers inappropriate for certiorari.

This Court has previously held that a guilty plea should be considered involuntary if the defendant did not understand the relation of the admitted facts to the law at the time of the plea. *Boykin v. Alabama*, 395 U.S. 238, 243 n. 5 (1969). In addition, the requisite level of understanding must include "real notice of the true nature of the charge against him." *Henderson v. Morgan*, 426 U.S. 637, 644 (1976). For the defendant to understand the "true nature of the

charge," he must actually understand each of the requisite elements; a mere recitation of the charge will not satisfy this requirement under most circumstances. *Id.* at 645-46. In Respondent's case, after an exhaustive, fact-intensive review of the record, the Sixth Circuit determined that these requirements had not been satisfied; therefore, Respondent's guilty plea had been entered involuntarily. The Sixth Circuit's decision draws on ample support from both the facts and circumstances surrounding the guilty plea, the relevant precedents of this Court, and the application of these precedents in the sister circuits. Thus, Petitioner's attempts to characterize the Sixth Circuit's decision as either a maverick outlier, or the vanguard of a developing split are not supported by either the facts or the law. The Sixth Circuit's decision rests on a deep factual bed-rock, and it is entirely consistent with the relevant legal standards.

The Sixth Circuit conducted an exhaustive review of the facts and circumstances surrounding Respondent's guilty plea. The court noted that Respondent had been charged with a crime that required intent and that the state proffered only a single theory of intent based upon the assertion that Respondent was the shooter. However, Respondent had continually professed that he did not shoot the victim, a position the state later proved in the subsequent trial of his accomplice. *Stumpf v. Mitchell*, 367 F.3d 594, 600-601, 611 (6th Cir. 2004). Given the nature of the charge, and the fact that Respondent had always maintained he was innocent of the actual shooting, the court undertook a careful review of the plea proceedings to determine whether Respondent demonstrated a true understanding of the charges against him. *Id.* at 602-07. It should be noted that, as in *Henderson*, this review required particular care given Respondent's diminished mental capacity. *Id.* at 605. The court began its review by quoting, in its entirety, the prosecutor's account of the plea agreement. *Id.* at 602-03. The court commented that the prosecutor offered only an unclear and confused account of the plea agreement, failings which

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were only compounded when Judge Henderson asked Respondent to verify the prosecutor's explanation of the agreement without attempting to ascertain whether Respondent actually understood that explanation. *Id.* The court then proceeded to examine the entire plea colloquy that followed. *Id.* at 603-07. According to the court's examination of the colloquy transcript, which the decision quotes in its entirety, "[n]owhere does the court explain the elements, or even read the charges as listed in the indictment." *Id.* at 605. More importantly, the court determined that Respondent never received notice that the charge required "specific intent," let alone what a finding of "specific intent" would necessarily include. *Id.* at 605 n.4.

As the court continued its point by point analysis of the record, it discovered a radical misunderstanding between Respondent and the court, an understanding which remained uncorrected throughout the proceedings. This misunderstanding first appeared when Judge Henderson questioned Respondent about the rights he would surrender if he pled guilty. *Id.* at 605-06. The Sixth Circuit determined that this exchange indicated that Respondent believed he would still be afforded the opportunity to present his account of the crime, an account that has never included himself as the shooter. *Id.* According to the Sixth Circuit, Respondent's consistent position on this point should have indicated to all parties concerned that "the defendant did not wish to concede the state's version of the facts." *Id.* at 606. For the Sixth Circuit, the fact that Respondent believed that his plea did not require him to admit to the intentional shooting of the victim comes through loud and clear in the following exchange:

> JUDGE HENDERSON: Are you in fact guilty of court one with specification one and specification four?
> STEPHENS (Counsel for Respondent): One moment, Your Honor. *Your Honor, the defendant has asked me to explain his answer. His answer is yes. He will recite that with obviously his understanding of his right to present evidence at a later time relative to his conduct, but he'll respond to that.*

Id. at 606 (emphasis in original). Judge Henderson responded to this simply by noting that Respondent would be permitted to present evidence at the mitigation hearing. *Id.* The Sixth Circuit concluded that Judge Henderson "completely miss[ed] the clear implication that despite his admission of guilt, Stumpf was concerned about preserving his ability to contest the state's account of his actions." *Id.* at 607. The court further supported this conclusion with sections of defense counsel's argument at the evidentiary hearing, which also directly contradicted the prosecutor's version of events. *Id.* Indeed, Respondent never altered his account of the crime, nor did he waiver in his belief that he was not pleading to a crime inconsistent with that account. Based on its extensive review of the facts, the Sixth Circuit concluded that Respondent's position was entirely inconsistent with the charge to which he pled guilty. *Id.* This radical disconnect, in turn, rendered Respondent's guilty plea involuntary.

The Sixth Circuit concluded that the specific facts and circumstances surrounding Respondent's guilty plea rendered it involuntary according to the dictates of *Boykin* and *Henderson*. *Id.* at 608-10. Specifically, the court held that the disconnect between the charge and its elements and Respondent's account of the crime and belief about what role that account would play in the process clearly indicated that Respondent never possessed an understanding of the law in relation to the facts. *Id.* at 608. Further, the facts clearly indicated that Respondent understood neither the nature of the charge against him, nor the full consequences of his guilty plea. Such a guilty plea is involuntary according to *Boykin* and *Henderson*; therefore, the Sixth Circuit granted relief on this claim.

The Sixth Circuit's decision is consistent with *Henderson*. As in *Henderson*, 426 U.S. at 645-46, the facts indicate that Respondent pled guilty to a charge despite the fact that he clearly misunderstood the nature of that charge. More specifically, as in *Henderson*, the record clearly

indicates that no one ever sufficiently explained the elements of the charge to Respondent. *Id.* To reach this decision, the Sixth Circuit examined the facts and determined that defense counsel's assertion that it had explained the charge could not be afforded any real weight given the fact that Respondent himself continued to request the opportunity to relate his own account of the crime, an account which completely contradicted the charge. The Sixth Circuit also decided not to give any real weight to counsel's representations because of the many indications that Respondent's counsel was constitutionally ineffective.[1] In addition, the Sixth Circuit specifically noted that Respondent "has a low IQ and has been found to be mentally and emotionally immature." *Stumpf*, 367 F.3d at 605. Once again, this reflects the unique facts that were present in *Henderson*, 426 U.S. at 647. Thus, the Sixth Circuit's decision amounts to nothing less than the application of the same legal principles found in *Henderson* to substantially the same facts.

The Sixth Circuit's decision also reflects the consensus developing among the sister circuits as to which facts are most relevant to reviewing a guilty plea. Petitioner attempts to point to cases from the Eighth and Tenth Circuits as evidence of a developing split, however, these cases merely present cases lacking the essential factual elements present in Respondent's case. In *Gregory v. Solem*, 774 F.2d 309, 315-316 (8th Cir. 1985), the Eighth Circuit refused to find a guilty plea involuntary and specifically noted that unlike *Henderson*, and unlike Respondent's case, the defendant in *Gregory* enjoyed effective counsel and did not suffer from diminished mental capacity. In *Allen v. Mullin*, 368 F.3d 1220, 1242 (10th Cir. 2004), the Tenth Circuit also refused to find a guilty plea involuntary in large part because the facts in the record indicated that the defendant received effective counsel. However, in *Gaddy v. Linahan*, 780

[1] Ineffective assistance of counsel was not raised as an independent claim; however, the Sixth Circuit devoted several paragraphs to the multiple errors that "would manifestly constitute ineffective assistance." *Stumpf*, 367 F.3d at 610

F.2d 935, 945 (11th Cir. 1986), the Eleventh Circuit held a guilty plea involuntary and specifically noted that the defendant suffered from diminished mental capacity and was illiterate. The court argued that the defendant's condition required a more involved explanation of the charges than the record indicated he received. *Id.* Thus, these cases do not point to an emerging split in the circuits, as Petitioner alleges; rather, these cases simply present examples of separate courts applying the same basic legal standards to varying fact patterns. Indeed, what all these cases really demonstrate is that whether a guilty plea was involuntary presents a question that depends entirely upon the facts.

The Sixth Circuit's decision relies upon an exhaustive analysis of the facts and a meticulous application of the relevant law to those facts. Indeed, this Court routinely denies *certiorari* to fact-intensive cases precisely because they are more properly handled at the lower court level. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 456-57 (1995) (Scalia, J. dissenting), citing *United States v. Johnston*, 268 U.S. 220, 227 (1925). This is just such a case. The Sixth Circuit reviewed all of the relevant facts and held Respondent's guilty plea involuntary according to the guidelines established by this Court's jurisprudence. Such a decision offers nothing for review.

II. The Sixth Circuit's decision that the prosecution secured successive convictions based on inconsistent, irreconcilable theories was correctly reached and is consistent with this court's precedent.

This Court's review of the Sixth Circuit's decision finding a due process violation is inappropriate because Respondent is nonetheless entitled to habeas relief on his claim that his guilty plea was invalid. A decision by this Court on the state's second question presented, therefore, would not change the outcome of the case.

In its well-reasoned decision, the Sixth Circuit concluded that Respondent's due process rights were violated when the prosecutor used inconsistent, wholly irreconcilable theories to

prosecute Respondent and his accomplice, Wesley. *Stumpf*, 367 F.3d at 618. As the Sixth Circuit stated, this conclusion is consistent with this Court's precedent as well as the decisions of other circuit courts that have addressed the issue. *Id.* at 611-12. At least two other circuit courts have concluded that the use of inconsistent, irreconcilable theories to secure convictions against two or more defendants for prosecutions for the same crime violates the due process clause. *Smith v. Groose*, 205 F.3d 1045, 1052 (8th Cir. 2000); *Thompson v. Calderon*, 120 F.3d 1045, 1058-59 (9th Cir. 1997) (en banc). *See also Nichols v. Scott*, 69 F.3d 1255, 1271 (5th Cir. 1995) (addressing the issue but holding that the prosecutor's theories were not inconsistent); *Drake v. Kemp*, 762 F.2d 1449, 1470 (11th Cir. 1985) (en banc) (Clark, J., specially concurring) (concluding that the prosecutor's use of totally inconsistent theories violated the Fourteenth Amendment).

In addition, the Sixth Circuit reached a fair and just conclusion with respect to this issue. The state incorrectly asserts that Stumpf's claim "amounts to a claim that he has a right to have the State vacate his guilty plea to the charged offense simply because evidence later comes to light that might have been helpful to him had he gone to trial." (Brief for the Petitioner at 18). Here, the state grossly understates the nature of the inconsistencies in the prosecutor's case. As the Sixth Circuit concluded, the issue involved more than merely newly-discovered evidence. That court concluded that the prosecutor's statements in support of the conviction and death sentence of Respondent were "irreconcilably inconsistent with those made by the very same prosecutor at Stump's plea hearing." *Stumpf*, 367 F.3d at 613. Therefore, it was the prosecutor's manipulation of the evidence that caused the due process violation. At Respondent's guilty plea hearing, the prosecutor stated:

> Believing that he had killed Mr. Stout, Stumpf [then] turned the same chrome colored Raven automatic pistol upon Mary Jane Stout as she sat on the bed and

> shot her four times. Three times in the left side of the head and neck and one time in the wrist; obviously in order not to leave anyone available to identify him.
>
> Then, at Wesley's trial, the same prosecutor argued before the jury:
>
> Believing he had killed Mr. Stout, [Stumpf] pitched the gun aside and left the immediate area back the hallway down the steps to the basement. At that point [Wesley,] whose own gun was jammed, picked that chrome colored Raven up and Mrs. Stout sat helplessly on her bed, shot her four times in order to leave no witnesses to the crime.

Id. Thus, the prosecutor clearly argued in each proceeding that the defendant in that proceeding killed Mary Jane Stout. By using such methods to secure convictions, the prosecutor violated his constitutional and ethical duties to seek justice. As this Court has stated, "because the prosecutor is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer ..., it is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate method to bring about one." *Berger v. United States*, 295 U.S. 78, 88 (1935), *overruled on other grounds*, *Stirone v. United States*, 361 U.S. 212 (1960). The Sixth Circuit decision was therefore consistent with this Court's "overriding concern with the justice of finding guilt." *United States v. Agurs*, 427 U.S. 97, 112 (1976).

Furthermore, this is not a case in which a defendant is simply seeking an undue benefit after a conviction. Since his guilty plea hearing, Respondent has been absolutely consistent in arguing that Wesley, not he, shot and killed Mary Jane Stout. *Stumpf*, 367 F.3d at 607. On the other hand, the state has constantly shifted theories to pursue and then maintain inherently inconsistent convictions. The Sixth Circuit opinion recognized this, pointing out that the state shifted its position during oral arguments before the panel. *Id.* at 614. During oral arguments, the state argued that Eastman's testimony that Wesley was the actual shooter was "completely unreliable." *Id.* The Sixth Circuit found this position "just short of astounding," because the

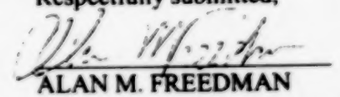
state had based its proof of specific intent solely on Eastman's testimony that Wesley was the actual shooter. *Id.*

In sum, the Sixth Circuit's decision corrects an injustice that would have occurred from a defendant being convicted and sentenced to death for the exact conduct that the prosecutor later attributes to another defendant. The writ of certiorari should be denied in this case.

CONCLUSION

For the reasons described above, the petition for writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

Please take notice that on December 10, 2004, I served Diane Richards Brey, Deputy Solicitor, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, by sending three (3) copies of the above and foregoing Brief in Opposition to Writ of Certiorari and Motion for Leave to Proceed *In Forma Pauperis*, via Federal Express.

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